

Docket: 2012-2690(IT)I

BETWEEN:

PAULINE I. DOUCETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 9, 2013, at Sudbury, Ontario.

Before: The Honourable Justice François Angers

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Tamara Watters

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* in respect of the 2010 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of April 2013.

"François Angers"

Angers J.

Citation: 2013 TCC 112

Date: 20130429

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BETWEEN:

PAULINE I. DOUCETTE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal of the appellant's 2010 taxation year. By Notice of Assessment dated October 31, 2011, the appellant was reassessed to include payments in the total amount of \$27,000 pursuant to an Interim Agreement entered into by the appellant with her former spouse on April 7, 2009. The appellant duly objected on January 27, 2012 but the Minister confirmed the reassessment on May 4, 2012. Hence, this appeal.

[2] The appellant and her former spouse have been living separate and apart since February 2009. On April 7, 2009, through mediation, they executed an Interim Agreement where the former husband was required to pay to the appellant the amount of \$2,250 per month for spousal support in two equal instalments commencing April 15, 2009 until the sale of the matrimonial home or until a more comprehensive agreement is entered into. Another paragraph of the Interim Agreement reads that the support payments would be reviewed.

[3] The Interim Agreement included no requirements for payments in respect of any child.

[4] The Interim Agreement was registered for enforcement by the Ontario Ministry of Community and Social Services under the *Family Responsibility and*

Support Arrears Enforcement Act at the Ontario Court of Justice and filed on record with a supporting affidavit, in the registry of the court on April 17, 2009. The Interim Agreement was later registered with the Minister of National Revenue on April 21, 2009 with an accompanying CRA Form T1158 "Registration of Family Support Payments". The Interim Agreement, as registered with the Minister, included no termination date for the monthly payments but the appellant continued to receive the support payments beyond 2010.

[5] According to the Interim Agreement, none of the support payments were payable directly to any creditor of either the appellant or her former spouse or any agent of any creditor. The appellant was required though to make the mortgage, insurance and property tax payments for the matrimonial home and to indemnify her former spouse for any non-payment of these obligations.

[6] The appellant and her former spouse entered into a written agreement for the sale of the matrimonial home on July 16, 2010 with a closing date of July 30, 2010. The appellant continued to receive the support payments after the closing and has, in fact, admitted at trial that the support payments beyond the closing date should have been included in her income. She has also admitted having received a total amount of \$27,000 for the entire 2010 taxation year pursuant to the Interim Agreement. Her appeal therefore only rests on whether the support payments prior to the closing date should have been included in her income for her 2010 taxation year.

[7] The appellant's position is that she and her former spouse had a legal responsibility to pay off the mortgage and as such she had no choice but to make the mortgage payments with the support payments she received. She submits that the mortgage payments should at least be deducted from the support payments for taxation purposes. The appellant also submits that upon the sale of the matrimonial home, the equity in the home was divided equally such that half of the mortgage payments for 2010, that were payments on the capital, were returned to her former spouse. No evidence was lead by the appellant as to the actual mortgage payments or what that total amount would be.

[8] The respondent's position is that the entire \$27,000 paid to the appellant during the 2010 taxation year was a support amount within the meaning of subsection 56.1(4) of the *Income Tax Act* (the "Act") and was therefore properly assessed pursuant to paragraph 56(1)(b) of the *Act* in computing the appellant's income for her 2010 taxation year.

[9] Paragraph 56(1)(b) of the *Income Tax Act* reads as follows:

Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(a) [...]

(b) the total of all amounts each of which is an amount determined by the formula

$$A - (B + C)$$

where

A is the total of all amounts each of which is a support amount received after 1996 and before the end of the year by the taxpayer from a particular person where the taxpayer and the particular person were living separate and apart at the time the amount was received,

B is the total of all amounts each of which is a child support amount that became receivable by the taxpayer from the particular person under an agreement or order on or after its commencement day and before the end of the year in respect of a period that began on or after its commencement day, and

C is the total of all amounts each of which is a support amount received after 1996 by the taxpayer from the particular person and included in the taxpayer's income for a preceding taxation year;

[...]

[Emphasis added]

[10] In subsection 56.1(4) of the *Act*, "support payment" is defined as follows:

"support amount" means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient, children of the recipient or both the recipient and children of the recipient, if the recipient has discretion as to the use of the amount, and

(a) the recipient is the spouse or common-law partner or former spouse or common-law partner of the payer, the recipient and payer are living separate and apart because of the breakdown of their marriage or common-law partnership and the amount is receivable under an order of a competent tribunal or under a written agreement; or

(b) the payer is a legal parent of a child of the recipient and the amount is receivable under an order made by a competent tribunal in accordance with the laws of a province.

[11] Subsection 56.1(1) is also relevant in that:

For the purposes of paragraph 56(1)(b) and subsection 118(5), where an order or agreement, or any variation thereof, provides for the payment of an amount to a taxpayer or for the benefit of the taxpayer, children in the taxpayer's custody or both the taxpayer and those children, the amount or any part thereof

- (a) when payable, is deemed to be payable to and receivable by the taxpayer; and
- (b) when paid, is deemed to have been paid to and received by the taxpayer.

[12] The appellant and her former spouse have been living separate and apart since February 2009 because of a breakdown in their marriage. They both executed an Interim Agreement on April 7, 2009 that provided what was termed "spousal support" that the former spouse was required to pay to the appellant in the amount of \$2,250 per month commencing April 15, 2009 in two equal instalments per month. Those payments were made directly to the appellant in consecutive series of post-dated cheques. The Interim Agreement was filed with the Ontario Court of Justice giving the agreement the same force and effect as an order of that Court. That being said, the only remaining issues in this appeal are whether these pre-determined and periodic payments were made for the maintenance of the appellant and whether she had discretion as to their use.

[13] The term used in the Interim Agreement for the monthly payments is "spousal support" and I believe it speaks for itself. It is an amount that the appellant has received as an allowance for her maintenance and to which she has agreed and acknowledged that she should have included that amount in her income. Her only objection is for the first six months of taxation year 2010 where she says she had no discretion as to the use of these amounts as she had agreed to pay the mortgage, insurance and taxes for the matrimonial home. No evidence was adduced as to what these actual payments were.

[14] The clause in the Interim Agreement wherein the appellant agrees to pay the mortgage, insurance and taxes is there for the reason that the appellant continued to reside in the matrimonial home after their separation and the support payments were in fact made to her as an allowance for maintenance. In fact, after the sale of the house, the spousal support payments were maintained and they allowed the appellant to pay her other maintenance costs such as rent and utilities.

[15] The increase in the equity of the matrimonial home as a result of the appellant paying the mortgage does not change the status of the "spousal support" in that it is an allowance for the maintenance of the appellant. I agree with Justice Hugessen of the Federal Court of Appeal in *McKimmon v. M.N.R.*, [1990] 1 C.T.C. 109, at paragraph 15, where he writes that "common experience indicates that such things as

life insurance premiums and blended monthly mortgage payments, while they allow an accumulation of capital over time, are a normal expense of living which are paid from income and can properly form part of an allowance for maintenance".

[16] The circumstances of this case lead me to the conclusion that the appellant had full discretion with respect to the use of these amounts. She chose and agreed to pay the mortgage, insurance and taxes because she occupied the matrimonial home.

[17] The appellant also suggested that her former spouse had actually agreed to pay 50% of the house expenses as per an e-mail sent prior to the Interim Agreement. That may well be but the Interim Agreement is what was eventually signed and agreed to by the appellant and her former spouse.

[18] As a result, the total amount of \$27,000 received by the appellant in her 2010 taxation year was a "support amount" within the meaning of the *Act* and should have been included in the appellant's income for that year.

[19] The appeal is dismissed.

Signed at Ottawa, Canada, this 29th day of April 2013.

"François Angers"

Angers J.

CITATION: 2013 TCC 112

COURT FILE NO.: 2012-2690(IT)I

STYLE OF CAUSE: Pauline I. Doucette v. Her Majesty the Queen

PLACE OF HEARING: Sudbury, Ontario

DATE OF HEARING: April 9, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENT: April 29, 2013

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Tamara Watters

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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